(2)

Supreme Court, U.S.
FILED
FEB 25 2002
CLERK

No. 01-858

In the

Supreme Court of the United States

ESTATE OF JOSEPH SCOTT GLADDEN, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM
Assistant Attorney General

ROBERT S. GREENSPAN
MARK S. DAVIES
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15pp

QUESTION PRESENTED

Whether an individual who notifies a federal agency of a claim for damages "in excess of the sum of $100,000.00" has specified a "sum certain" and therefore met a precondition for bringing a lawsuit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Bradley v. *United States ex rel. Veterans Admin.*, 951 F.2d 268, 271 (10th Cir. 1991)	5, 7
Corte-Real v. *United States*, 949 F.2d 484, 487 (1st Cir. 1991)	8
Erxleben v. *United States*, 668 F.2d 268, 270 (7th Cir. 1981)	8, 9
Fallon v. *United States*, 405 F. Supp. 1320 (D. Mont. 1976)	8
Flory v. *United States*, 138 F.3d 157, 159 (5th Cir. 1998)	10
Industrial Indemnity Co. v. *United States*, 504 F. Supp. 394 (E.D. Cal. 1980)	8-9
Johnson v. *Smithsonian Institution*, 189 F.3d 180, 189 (2d Cir. 1999)	10
Martinez v. *United States*, 728 F.2d 694 (5th Cir. 1984)	9
Montoya v. *United States*, 841 F.2d 102 (5th Cir. 1988)	9
Phillips v. *United States*, 260 F.3d 1316 (11th Cir. 2001)	11
Pipkin v. *United States Postal Serv.*, 951 F.2d 272, 274-275 (10th Cir. 1991)	11
Roman v. *Townsend*, 224 F.3d 24, 28 (1st Cir. 2000)	10
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504, 512 (1994)	6

Statutes and regulations:

Federal Tort Claims Act, Ch. 753, § 403(a), 60 Stat. 842, codified as amended, 28 U.S.C. 1346(b), 2671-2680	1
28 U.S.C. 2401(b)	2, 10

28 U.S.C. 2672 ..... 2, 3, 6, 7
28 U.S.C. 2675(a) 2
28 U.S.C. 2675(b) 2, 7
28 C.F.R. 14.2(a) 3, 6, 9
28 C.F.R. 14.11 5
28 C.F.R. 543.32(a) 3, 4, 6, 10

In the

Supreme Court of the United States

No. 01-858

ESTATE OF JOSEPH SCOTT GLADDEN, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The unreported order of the court of appeals is reproduced at Pet. App. 1a-4a. The unreported opinion of the district court is reproduced at Pet. App. 5a-11a.

JURISDICTION

The order of the court of appeals was entered on September 6, 2001. Pet. App. 1a. The petition for a writ of certiorari was filed on December 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1946, Congress adopted the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, to waive the government's immunity from suit and to render the United

States liable in damages to the same extent as a private party for injuries caused by the negligent or tortious acts of federal employees, subject to certain restrictions and limits. As originally enacted, the FTCA authorized heads of federal agencies to review and attempt to settle such claims only "where the total amount of the claim does not exceed $1,000." FTCA, Ch. 753, § 403(a), 60 Stat. 842, 843. Presentation of the claims to the agency was optional. *Id.* § 410(b), 60 Stat. 844.

In 1966, Congress amended the FTCA to facilitate administrative settlement of tort claims against the federal government and thereby reduce district court congestion. In particular, Congress granted to the head of each federal agency the authority to "consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States" in accordance with regulations prescribed by the Attorney General. 28 U.S.C. 2672. Congress also provided that an FTCA action "shall not be instituted * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. 2675(a). The claim must be presented to the agency within two years of accrual, and any FTCA lawsuit must be brought within six months of the agency's decision denying the claim. 28 U.S.C. 2401(b). In addition no FTCA action may "be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence." 28 U.S.C. 2675(b).

As contemplated by Congress, the Attorney General has issued regulations describing the general procedures for agency handling of FTCA claims. Those regulations, contained in 28 C.F.R. Part 14, state that a claim is deemed "presented" to the agency when the agency receives "an

executed Standard Form 95 or other written notification of an incident, accompanied by *a claim for money damages in a sum certain.*" 28 C.F.R. 14.2(a) (emphasis added). Consistent with those regulations, Standard Form 95—developed by the Department of Justice to facilitate agency processing of FTCA claims—asks the claimant to specify the "total" amount of the claim and warns that "[f]ailure to specify may cause forfeiture of your rights." See Pet. C.A. Br. App. 1. In another location, in bold typeface, Standard Form 95 further advises claimants: "Failure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights." See *id.* at 2.

The Attorney General's regulations also authorize each agency to issue supplemental regulations and procedures for processing FTCA claims. 28 C.F.R. 14.11. The Bureau of Prisons (Bureau or BOP) has issued regulations pursuant to that authority. The Bureau's regulations provide that, to permit the Bureau to "consider, ascertain, adjust, determine, compromise, and settle" claims, see 28 U.S.C. 2672, an FTCA claimant must provide the Bureau with the "time, date, and place where the incident occurred, and a specific sum of money you are requesting as damages." 28 C.F.R. 543.32(a).

2. Joseph Scott Gladden, an employee of the Federal Bureau of Prisons, committed suicide in February of 1996. Almost two years later, his mother, petitioner Sharron Gladden, filed a Standard Form 95 alleging that Mr. Gladden's death was caused by the Bureau's negligence and seeking damages on behalf of Mr. Gladden's estate. Petitioner Gladden did not include a "total" amount of damages on the Standard Form 95, but she attached a narrative stating that she sought "in excess of the sum of $100,000.00." Petitioner Gladden's form did not refer to

any injuries suffered by her individually, by the decedent's wife, or by the decedent's children.

Mr. Hood, the Regional Counsel for the Bureau, denied the claim on June 8, 1998. Mr. Hood noted that the claim did not include the required "sum certain" of total damages. Gov't C.A. App. 7. In addition, he noted "[o]ther considerations" that rendered the claim "not properly presented." *Ibid.* For example, "the claim contains no documentation demonstrating that Ms. Gladden is the personal representative of Mr. Gladden's estate * * * ." *Id.* at 8. Although the Bureau usually affords claimants an opportunity to submit new, corrected claims when their initial claims are insufficient, see 28 C.F.R. 543.32(a), there was no time to do so here because petitioner Gladden had submitted her claim only two days before the statute of limitations lapsed. As a result, Mr. Hood issued a letter denying the claim and advising petitioner Gladden that she had six months within which to bring a lawsuit in district court under the FTCA. Gov't C.A. Br. App. 7-8.

3. a. In February of 1999 and 2000—more than six months after the Bureau's decision—petitioner Gladden filed complaints in the United States District Court for the Western District of Oklahoma. The complaints alleged several FTCA claims on behalf of the Estate of Joseph Scott Gladden, as well as FTCA claims on behalf of various individuals, including decedent's mother (petitioner Sharron Gladden) and decedent's children.[1]

The United States moved to dismiss for lack of jurisdiction. The government argued that petitioners had not met at least two prerequisites for bringing an FTCA action. First, the government pointed out that the claim petitioner

---

[1] Petitioners also alleged various violations of Mr. Gladden's constitutional rights. The district court dismissed the constitutional claims as barred by the statute of limitations. Petitioners did not appeal from the dismissal of the constitutional claims. See Pet. App. 4a.

Gladden had presented to the Bureau did not include a claim for damages in a "sum certain." Second, the government noted that petitioners' lawsuit was filed more than six months after the agency denied the claim.[2]

The district court granted the government's motion to dismiss for lack of subject matter jurisdiction. The district court agreed with the government that petitioners had not met the "sum certain" requirement because petitioner Gladden's request for damages "in excess of the sum of $100,00.00" did not constitute a "sum certain." Pet. App. 7a. The district court did not reach the government's alternative contention that petitioners' lawsuit was filed outside the six-month filing period.

b. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed. Pet. App. 1a-4a. The court noted that the "sole issue on appeal is whether plaintiffs' claim, which stated their damages as 'in excess of $100,000,' satisfied the notice requirements of the FTCA." Pet. App. 3a. The court observed that this "precise issue was addressed and resolved by [the Tenth Circuit] in *Bradley* v. *United States ex rel. Veterans Admin.*, 951 F.2d 268, 271 (10th Cir. 1991)." The court explained that a "valuation without a ceiling does not 'afford the agency sufficient information to determine whether Plaintiff's claim [is] realistic or settleable.'" *Ibid.* (quoting *Bradley*, 951 F.2d at 271).

ARGUMENT

The unpublished decision below is correct and does not conflict with the decision of any other court of appeals. Accordingly, further review is not warranted.

---

[2] The Bureau denied petitioner Gladden's claim on June 2, 1998. Accordingly, petitioner was required to file an FTCA lawsuit no later than December 2, 1998. This lawsuit, filed on February 7, 2000, and an earlier lawsuit, filed on February 5, 1999, were thus both untimely.

1. The court of appeals correctly concluded that petitioners' FTCA lawsuit is barred because petitioners failed to provide the Bureau with the specific value of their claims. To permit the Bureau to "consider, ascertain, adjust, determine, compromise, and settle" claims, see 28 U.S.C. 2672, the Bureau has issued a regulation providing that an FTCA claim must include the "time, date, and place where the incident occurred, and a specific sum of money you are requesting as damages." 28 C.F.R. 543.32(a). The Standard Form 95 filed by petitioner Gladden similarly specifies that the claimant must provide the "total" amount of the claim, and warns (in two locations) that "[f]ailure to specify a sum certain will result in invalid presentation of your claim and may result in forfeiture of your rights." Pet. C.A. Br. App. 2; see *id.* at 1 (similar warning). See also 28 C.F.R. 14.2(a) (Department of Justice regulation providing that a claim is deemed "presented" to the agency when the agency receives "an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages *in a sum certain*." (emphasis added)).

In this case, petitioner Gladden informed the Bureau that the Estate of Mr. Gladden had tort damages "in excess of the sum of $100,000.00." The Bureau, through its Regional Counsel, determined that this statement did not constitute the "sum certain" required by the Bureau's and Attorney General's regulations. That decision is reasonable because it is consistent with both the language and purpose of the regulation. See *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (an agency's interpretation of its own regulation "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation"). As a matter of ordinary meaning, a demand for damages "in excess of the sum of $100,000.00" is not a demand for a "sum certain," because there is nothing certain or fixed about the sum being demanded. Petitioner Gladden could later have

valued the tort action at *any* number above $100,000 consistent with the initial demand. Indeed, for all the Bureau knew, petitioner Gladden valued the Estate's claim at $1 million, $10 million or higher. Compare *Bradley* v. *United States*, 951 F.2d 268, 271 (10th Cir. 1991) (noting that original valuation of "in excess" of $100,000 was later increased by plaintiff to $600,000). In addition, while petitioner Gladden did describe the Estate's damages as exceeding $100,000, her claim provided *no* information regarding the value that the individual petitioners ascribed to their own claims, which are separate from the Estate's. In short, there was nothing "certain" about the damages petitioners sought through their FTCA claims. And without the required certainty, the agency was unable to "consider, ascertain, adjust, determine, compromise, and settle" claims, see 28 U.S.C. 2672, because the agency had no idea of the value petitioners ascribed to their potential lawsuits.

Petitioners do not challenge the Attorney General's or the BOP's regulations requiring FTCA claimants to provide a "sum certain" valuation of their injury. Instead, petitioners assert that the claim petitioner Sharron Gladden submitted to the BOP "did state a specific dollar amount, '$100,000.00.'" Pet. 8. In petitioners' view, "the agency could have reasonably limited the 'sum certain' of [petitioners'] claim to $100,000." *Ibid.* As discussed above, however, the "in excess of" language rendered the stated sum *uncertain*; petitioners in fact may have valued their claims at substantially more than $100,000.[3] In any event,

---

[3] For that reason, petitioners gain no support from 28 U.S.C. 2675(b), which generally provides that an FTCA action "shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency." The "amount of the claim" petitioner Gladden "presented" did not have an upper limit. As a result, it was not possible for petitioners to file a lawsuit seeking damages "in excess" of

it is not enough for petitioners to suggest an alternative interpretation of the "sum certain" requirement. An alternative interpretation of an agency's regulation does nothing to show that the agency's own interpretation is plainly erroneous or inconsistent with the regulation.

2. Petitioners assert (Pet. 4) that the decision below is in "direct conflict" with decisions of the Fifth Circuit and the Seventh Circuit. Petitioners' claim, however, would have been resolved identically regardless of the circuit in which it arose.

The Seventh Circuit has emphasized that failure to provide specific sums for *subtotals* does not render an FTCA claim invalid. In *Erxleben* v. *United States*, 668 F.2d 268, 270 (7th Cir. 1981), for example, the plaintiff's Standard Form 95 sought "$259.34" in "total" damages. The same form noted "$149.42 presently" in medical expenses. *Ibid.* The Seventh Circuit ruled that the form satisfied the sum certain requirement, despite the "presently" language in the subtotal, because the "total claim" amount was specified without qualification. *Id.* at 273. As a result, the "government could have acted on those figures." *Ibid.*

Here, in contrast, petitioners' claim included open-ended language when describing the *total* sum sought. The claim, by its terms, would have permitted petitioners to seek any sum of money in excess of $100,000. See *Corte-Real* v. *United States*, 949 F.2d 484, 487 (1st Cir. 1991) (describing holding in *Erxleben* as premised on plaintiff's statement of a "definite amount" in total box). Moreover, even though the subtotal provided in *Erxleben* was not definitive, it was approximate; the "presently" subtotal referred to outstanding medical bills, a relatively discrete amount.[4] In

---

the amount of their initial claim.

[4] See also *Fallon* v. *United States*, 405 F. Supp. 1320 (D. Mont. 1976) ("approximately $15,000"); *Industrial Indemnity Co.* v. *United States*,

contrast, the phrase "in excess of $100,000.00" at issue here incorporates an extraordinary range of potential values, especially in view of the relatively fluid valuations that may be used in wrongful death actions. Unlike the plaintiff in *Erxleben*, petitioners in this case did not provide the government with figures that the agency "could have acted on."

Petitioners likewise err in relying on an alleged conflict between the decision below and *Martinez* v. *United States*, 728 F.2d 694 (5th Cir. 1984). In *Martinez*, the Fifth Circuit held that the "presentation of an administrative claim 'in excess of $100,000' is a reasonable compliance with the 'sum certain' requirement of 28 C.F.R. § 14.2." 728 F.2d at 697. After deciding *Martinez*, however, the Fifth Circuit has held that a plaintiff's use of "in excess" language, combined with other defects, can render the sum demanded sufficiently unclear that it does not meet the "sum certain" requirement. See *Montoya* v. *United States*, 841 F.2d 102 (5th Cir. 1988). In particular, the Fifth Circuit held that a claim for "in excess of $1,500.00" for property damages is insufficient where the claim failed to quantify the damages sought for personal injury and did not specify the damages sought on behalf of minors injured in the incident. *Id.* at 105. Petitioners' claim suffers from comparable defects. While the claim sought "in excess of $100,000" on behalf of decedent's estate, it nowhere attempted to quantify the extent of damages sought by the individual petitioners—including decedent's mother and children—on their own behalf. As a result, this case is governed by *Montoya*, not *Martinez*, and petitioners' claim would have been rejected even if the case had arisen in the Fifth Circuit.[5]

---

504 F. Supp. 394 (E.D. Cal. 1980) ("[c]ompensation benefits are continuing").

[5] Because petitioners would not have prevailed under the law of any circuit, this case is not an appropriate vehicle for resolving any tension

3. Petitioners' lawsuit, in any event, is jurisdictionally barred even apart from petitioners' failure to submit a valid claim for damages in a "sum certain" amount. The Federal Tort Claims Act specifies that any lawsuit must be brought within six months of the agency's decision denying the claim. 28 U.S.C. 2401(b). It is undisputed that petitioners filed their lawsuit well after that period had elapsed. Indeed, although the Bureau denied petitioner Gladden's claim on June 2, 1998, petitioners did not file this lawsuit until February of 2000, more than a year after the statutory six-month period had expired; they filed an earlier lawsuit in February of 1999, but that suit was still three months out of time. As a result, petitioners' FTCA claim is jurisdictionally barred. See *Roman* v. *Townsend*, 224 F.3d 24, 28 (1st Cir. 2000) ("[T]he requirement that a plaintiff sue the United States within the period of limitations in an action brought under the FTCA is jurisdictional in nature"); *Johnson* v. *Smithsonian Inst.*, 189 F.3d 180, 189 (2d Cir. 1999) (failure to meet limitations period deprives district court of "subject matter jurisdiction"); *Flory* v. *United States*, 138 F.3d 157, 159 (5th Cir. 1998) ("It is well settled that these limitations periods are jurisdictional").[6]

---

among the appellate courts. Any such tension, moreover, is not of substantial importance. Even where claimants do submit defective claims (such as where they fail to specify a sum certain), agencies generally notify claimants of those defects and provide the claimants with an opportunity to correct them, provided there is time to do so. See 28 C.F.R. 543.32(a) ("If you fail to provide all necessary information, your claim will be rejected and returned to you requesting supplemental information."). As a result, potential litigants usually have the opportunity to remove qualifying language and revise the sum demanded. That opportunity was lacking in this case only because petitioner Gladden filed her demands just before the statute of limitations lapsed.

[6] In the district court, petitioners argued that they were entitled to rely on the two-year statute of limitations provided by Oklahoma state

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM
Assistant Attorney General

ROBERT S. GREENSPAN
MARK S. DAVIES
Attorneys

FEBRUARY 2002

---

law. The claim that state law can supersede the six-month period for filing suit provided by the FTCA is without merit. See *Phillips* v. *United States*, 260 F.3d 1316 (11th Cir. 2001); *Pipkin* v. *United States Postal Serv.*, 951 F.2d 272, 274-275 (10th Cir. 1991). Similarly, petitioners are not entitled to equitable tolling merely because they relied on a mistake of law, through no fault of the United States. When the Bureau rejected petitioner Gladden's claim it specifically warned that she had only "six months from the date of the mailing" of the rejection "within which to bring suit in the appropriate United States District Court." Gov't C.A. Br. App. 8. Petitioners simply chose to ignore that warning.